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No. 92-1297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. MELCHER, Acting Director
of the Missouri Department of Revenue,
THE MISSOURI DEPARTMENT OF REVENUE, and
THE STATE OF MISSOURI,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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1. Respondent urges this Court to deny certiorari concerning the issue of standing by misleading the Court and misstating the record. For the first time in this litigation respondent references 48 C.F.R. § 31.205-41(a)(2) and states that under the contract, "the federal contractor is entitled to reimbursement for state taxes that it must pay or that it pays under 'a claim illegality or erroneous assessment.'" Respondent's Brief, p. 6. These are not the facts of this case. The monies which respondent seeks in this action were funds voluntarily paid by Olin Corporation, the

federal contractor. Olin did not pay these taxes under a claim of illegality nor did the Missouri Department of Revenue issue an assessment to Olin concerning the monies which respondent seeks refunded in this action. Therefore, respondent's reference to §31.205-41(a)(2) is factually incorrect. Rather, § 31.205-41(b)(3) applied to respondent's reimbursement of the taxes paid by Olin. Pursuant to that section, respondent's reimbursement of Olin's tax payments was gratuitous. Hence, respondent was not injured by petitioners' conduct and has no standing.

Misstating the record, respondent argues that it has an "obvious and meaningful financial stake in application of the state tax to purchases of property in the name of the United States . . .." Respondent's Brief, p. 6. Respondent admitted in responses to requests for admissions "that Olin placed orders with third-party suppliers in *its own name* for all property which plaintiff (respondent) contends is not subject to taxation by defendants (petitioners)." R 795 (emphasis added). Olin's purchases were made in its own name not in the name of the United States. It is clear in this case that the United States seeks to litigate in federal court the meaning of a state tax exemption in order to secure a refund of taxes paid by Olin Corporation and voluntarily reimbursed by respondent. Under these circumstances, respondent lacks standing.

2. Respondent suggests that the lower courts correctly refused to abstain from this case for reasons of comity and federalism because there is nothing complicated in Missouri's tax law warranting abstention. Respondent is incorrect.

Both the Eighth Circuit and the District Court rely on a Missouri regulation, specifically, 12 CSR 10-3.012(3), to support the conclusion that Olin resells the property at issue here to the federal government. See Petitioners' Appendix A-8 and A-30. Subsequent to the filing of the petition, this rule was rescinded because it "misstates the sales tax law as it applies to persons who do not have an ownership interest in or title to

tangible personal property." See Supplemental Appendix attached hereto. The Administrative Hearing Commission, the Missouri body which would ordinarily resolve a sale for resale claim, could have determined that the state regulation relied upon by the District Court and the Eighth Circuit was invalid. See *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990) (Administrative Hearing Commission may determine that revenue regulations exceed state law). Federal courts are not likely to have the state taxation expertise to evaluate the policy implications and validity of state regulations as evidenced by the lower courts' failure to do so here. It is quite clear in this case, described by the District Court as one of first impression, that there are difficult and complex state law issues that pertain to state policy problems of great importance. Under these circumstances and because respondent only seeks to litigate the exclusion of its contractor's purchases from state taxation pursuant to state tax law, abstention is required.

Respondent contends that "whether the purchases of the federal contractor are at retail ultimately involves interpretation of the federal contract, which is a question of federal law . . .." Respondent's Brief, p. 7. Yet neither respondent nor the lower courts have cited those ambiguous provisions of the federal contract which they believe are in need of interpretation to reach the sale for resale determination they have all made. Rather, the sale for resale exclusion from state taxation must be decided on the facts of the transactions and by applying Missouri law to those facts, not on the characterization of the transactions contained in respondent's contract.

3. Finally, respondent suggest that this case should be resolved in a fashion identical to *U.S. v. California*, No. 91-2003 (argued Feb. 23, 1993). The decision of the Eighth Circuit should be reversed if *U.S. v. California* is affirmed. However, if *California* is reversed, this case will not be resolved. Based on the limited record available, petitioners find that there are at least two signifi-

cant factual distinctions between that case and the one before the Court suggesting a different result in the event of reversal.

The *California* case involves assessments against the federal contractor which were paid under protest. As stated above, this is not the factual situation here before the Court. Olin paid the taxes at issue without protest, claimed exemption or assessment and the respondent now seeks a refund of those funds. Furthermore, in *California,* the federal contractor paid the disputed taxes with funds provided by the United States; i.e., the taxes were paid with federal funds. In this case, the federal contractor paid the taxes with its own funds; i.e., Missouri holds a private entity's funds, not the federal government's funds. These two distinguishing facts suggest that respondent's interest in the funds it seeks to recover here is significantly more attenuated than in *California*. Consequently, petitioners' claim, that there exists no federal common law cause of action for the return of Olin's funds, cannot be resolved by reference to *California* if the Ninth Circuit's decision is reversed.

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Title 12 — DEPARTMENT OF REVENUE

Division 10 — Director of Revenue

Chapter 3 — State Sales Tax

EMERGENCY RESCISSION

[Filed: Feb. 19, 1993]

12 CSR 10-3.012 Sellers Subject to Sales Tax. This rule addressed the sales tax law as it applied to the sale of tangible personal property by persons who do not have an ownership interest in or title to the tangible personal property.

PURPOSE: This Emergency Rescission rescinds 12 CSR 10-3.012, because the rule misstates the sales tax law as it applies to persons who do not have an ownership interest in or title to tangible personal property.

EMERGENCY STATEMENT: It is necessary that this rule be rescinded to ensure compliance with the revenue laws of this state requiring the assessment and collection of sales tax. In light of the fact that the rule does misstate the sales tax law, the director of revenue concludes there is an immediate risk to the public welfare which can be met through the Emergency Rescission of this rule.

Auth: section 144.270, RSMo (1986). This rule was previously filed as rule no. 28, Jan. 22, 1973, effective Feb. 1, 1973. S.T. regulation 010-5 was filed Dec. 31, 1975, effective Jan. 10, 1976. Amended: Filed Aug. 13, 1980, effective Jan. 1, 1981. Amended: Filed April 29, 1983, effective Sept. 11, 1983. Emergency rescission filed Feb. 19, 1993, effective March 1, 1983, expires June 28, 1993. A normal rescission covering this same material is published in the Notices of Proposed Rulemaking in this issue of the *Missouri Register*.